ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 20-1295 and 20-1426 (consolidated)

XCEL ENERGY SERVICES INC.,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW
OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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APRIL 5, 2021

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioner's Circuit Rule 28(a)(1) certificate.

B. Rulings Under Review

1. *Public Service Company of Colorado*, "Order Rejecting Tariff Revisions," 171 FERC ¶ 61,115 (May 15, 2020), R.4, JA___–___;

   and

2. *Public Service Company of Colorado*, "Order Addressing Arguments Raised on Rehearing," 172 FERC ¶ 61,297 (Sept. 30, 2020), R.9, JA___–___.

C. Related Cases

This case has not previously been before this Court or any other court. To counsel's knowledge, there are no related cases pending elsewhere.

/s/ Jared B. Fish
Jared B. Fish

April 5, 2021

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GLOSSARY

A	Addendum
Br.	Petition for Review of Xcel Energy Services Inc.
Commission or FERC	Respondent Federal Energy Regulatory Commission
Edison Electric Institute or the Institute	Amicus in support of PSColorado
Independent System Operator	An entity that owns no electric infrastructure, but which operates interstate transmission lines in regional markets
Non-Independent System Operator	An entity that owns and operates electric infrastructure, such as transmission lines and electric generation resources
P	Internal paragraph number in a FERC order
PSColorado	Public Service Company of Colorado
Xcel Energy Services Inc. or Xcel	Petitioner in this appeal and parent company of PSColorado

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STATEMENT OF THE ISSUE

Electric transmission operators review requests by generation resources (i.e., power plants) to connect with the interstate transmission grid. Eighteen years ago, the Federal Energy Regulatory Commission ("Commission" or "FERC") established a default standard for assessing those requests. The core purpose of the so-called *pro forma* standard, codified in FERC Order No. 2003, is to prevent transmission system operators from favoring interconnections for their own generation resources over interconnections for independent generators. As such,

the *pro forma* default furthers the Commission's goal of promoting competition in electric power generation.

FERC Order 2003 recognizes, however, that not all transmission system operators are alike. Independent operators own neither generation resources nor transmission lines, whereas some non-independent operators, like the Public Service Company of Colorado ("PSColorado") in this matter, own both. The Commission found that the latter group of entities presents a heightened risk of discriminatory conduct in favor of their own generation resources' interconnection requests. And because a generation resource cannot sell and transmit its power without a physical interconnection, such a preference threatens generator competition.

Even so, Order 2003's default standard is not the only option. The Commission acknowledged that transmission system operators might develop individualized procedures that are as good as, or better than, the default standard in preventing discrimination. And due to the distinct risks of discriminatory conduct presented by independent and non-independent operators, Order 2003 also establishes distinct tests for reviewing proposed deviations from the default. An independent

operator is subject to a flexible "independent entity variation" test. But a non-independent operator must show that its proposal is "consistent with or superior to" the default standard—a more demanding test. In 2007, this Court upheld Order 2003. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

In March 2020, PSColorado sought Commission approval of a proposed deviation from the *pro forma* standard. Instead of the default's single, uniform interconnection review process, PSColorado sought to enact a two-tiered system. Its review of interconnection requests made by new generation resources would stay the same. But requests made by existing resources seeking to replace their facilities would undergo a streamlined, expedited evaluation.

The Commission had never before approved this type of bifurcated approach for a non-independent system operator, and it rejected PSColorado's proposal here. The Commission noted that PSColorado owns 60% of the existing generation on its electric grid. Given that, and because PSColorado's fast-track review process would apply exclusively to existing generation, the Commission found that PSColorado's proposal would inherently favor its own resources over those of its

competitors seeking to interconnect new generation for the first time. Accordingly, the Commission deemed PSColorado's proposal not "consistent with or superior to" the default standard.

The issue presented here is whether the Commission reasonably rejected PSColorado's proposed deviation from FERC Order 2003's default interconnection standard as not "consistent with or superior to" that standard, where PSColorado failed to establish that its proposal would not favor its own generation.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

JURISDICTIONAL STATEMENT

The Commission agrees with the statement of jurisdiction provided by Petitioner Xcel Energy Services Inc.[1] ("Xcel") in its opening brief.

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[1] Xcel is the parent company of its wholly-owned subsidiary, PSColorado. Because PSColorado is the electric utility that actually generates, transmits, distributes, and sells energy, for simplicity this brief uses the term "PSColorado" to refer to both entities. *See* Xcel Energy Servs. Inc., "Transmittal Letter," FERC Dkt. No. ER20-1153, at 2 (filed Mar. 4, 2020), R.3, JA___.

STATEMENT OF FACTS

I. Background

A. FERC Order 888: The Commission introduces *pro forma* standards requiring utilities to offer non-discriminatory, open access to their transmission service

"In the bad old days, utilities were vertically integrated monopolies." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004). A single electric utility owned and operated the power plants that generated electricity, the transmission lines that sent it across the grid, and the distribution lines that delivered it to homes and businesses. *See id*. "As the Supreme Court observed, with blithe understatement, '[c]ompetition among utilities was not prevalent.'" *Id*. (quoting *New York v. FERC*, 535 U.S. 1, 5 (2002)).

That changed dramatically in 1996 with FERC Order 888. *Id*. (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,635–36 (1996)). To foster competition in the area of electric generation, the Commission required utilities that owned transmission lines to guarantee unaffiliated generators non-discriminatory, open access to their transmission service. *See id*. at

1363–64. To implement the reform, FERC adopted a *pro forma* Open Access Transmission Tariff applicable to all transmission-owning public utilities. *Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 822 (D.C. Cir. 2008). The default tariff includes minimum terms and conditions for non-discriminatory service that all transmission system operators must follow. *Id*.

Concerns persisted, however, that transmission-owning utilities could continue "to discriminate in their own favor," notwithstanding Order 888's open-access provisions. *See Midwest*, 373 F.3d at 1364. Thus, Order 888 also encouraged utilities to divest control of their transmission lines. *Id*. While they would retain ownership over the lines, transmission operations would be turned over to a regional transmission organization, oftentimes run by an independent system operator.[2] *Id*. This structural reform, in the Commission's view, was the best way to prevent generation-owning utilities from favoring their own

[2] An independent system operator is a type of regional transmission organization. *Int'l Transmission Co. v. FERC*, 988 F.3d 471, 476 (D.C. Cir. 2021). Both are non-profit, independent entities that manage the electric grid by region on behalf of transmission-owning member utilities. *Id*. For simplicity, this brief uses the term "independent system operator" to refer to both entities.

generation over third-party resources. *Id*. Indeed, in a subsequent rulemaking (Order 2000), which incentivized the independent system operator model, the Commission found that independent operators "'remove[d] remaining opportunities for discriminatory transmission practices.'" *Id*. (quoting *Reg'l Transmission Orgs.*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 30,993 (1999)).

Independent system operators proliferated in the decade following FERC Order 888. Even so, some transmission-owning, non-independent system operators remained on the Nation's electric grid. As depicted in Figure 1 below, wholesale electric transmission and sales are today governed by regional independent system operators in much, but not all, of the country.

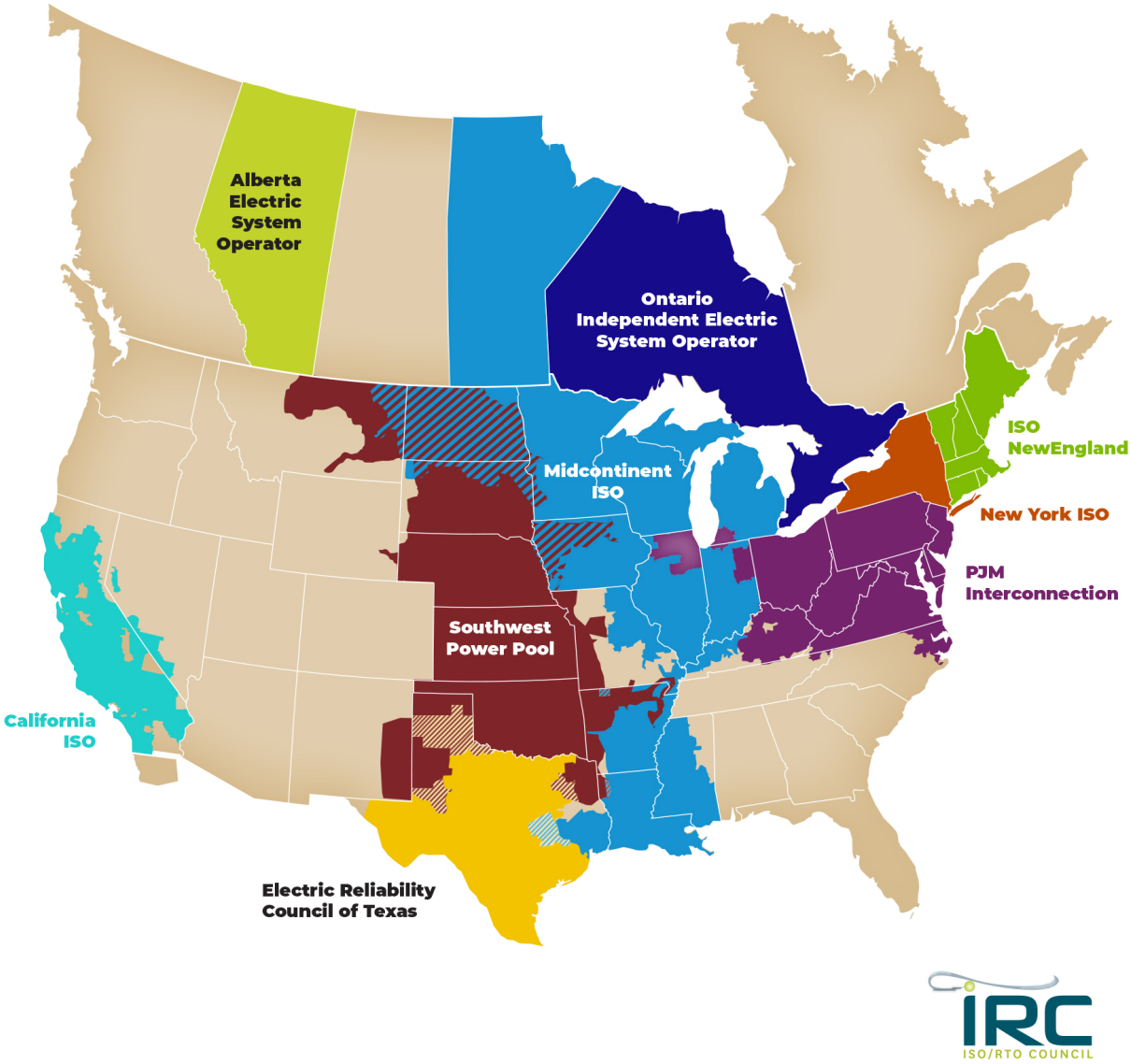

Figure 1: Regional Transmission Organizations, *available at* www.isorto.org (last accessed Apr. 5, 2021)

B. FERC Order 2003: The Commission expands open access to interconnections linking generation resources to the transmission grid

While FERC Order 888 tackled discrimination in transmitting energy *across* the grid, it did not address opportunities to discriminate in connecting generation *to* the grid in the first place. *See ESI Energy,*

LLC v. FERC, 892 F.3d 321, 324 (D.C. Cir. 2018). "[E]very time a new generator of electricity asked to use a transmission network owned by another—to interconnect the two entities—disputes between the generator and the owner of the transmission grid would arise, delaying completion of the interconnection process." *Id*. While the Commission ultimately resolved such disputes—albeit on a case-by-case basis—the upshot was "delay[ed] entry into the market by new generators," thus "providing an unfair competitive advantage to utilities owning both transmission and generation facilities." *Id*.

In 2003, the Commission dispensed with its *ad hoc* approach and settled on a uniform solution. Its aptly named FERC Order 2003 applied Order 888's non-discriminatory policies pertaining to electric transmission service to electric generator interconnections. *See id*. (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003)). To that end, FERC Order 2003 sought to realize—as relevant here—two core objectives: "(1) limit[ing] opportunities for Transmission Providers"—i.e., transmission system operators that review interconnection requests—"to favor their own generation, [and] (2) facilitat[ing] market

entry for generation competitors by reducing interconnection costs and time." Order 2003, P 12, Addendum ("A") 11–12.

Order 2003 implemented its goals by establishing a standard interconnection review process. To "prevent[] transmission facility owners from favoring affiliated generators over independents in interconnection," the Commission required public utilities—independent and non-independent system operators alike—"to adopt a standard agreement for interconnecting generators larger than 20 megawatts." *Nat'l Ass'n*, 475 F.3d at 1279 (upholding Order 2003); *see also* Order 2003, P 26, A15–16. Public utilities that own, control, or operate transmission facilities were required "to file revised open access transmission tariffs that include[d] *pro forma* Large Generator Interconnection Procedures and a *pro forma* Large Generator Interconnection Agreement." *Pac. Gas & Elec.*, 533 F.3d at 823.

"By mandating that 'standard set of procedures,' the Commission 'minimized opportunities for undue discrimination and expedited the development of new generation, while protecting reliability and ensuring that rates are just and reasonable." *ESI Energy*, 892 F.3d at 324 (cleaned up) (quoting Order 2003, P 11, A11). And, consistent with

Order 2003's non-discrimination purpose, the Order does not distinguish between new generation generally and new generation that replaces an existing resource at the same location: both are simply new generation under the Commission's rules. *See* Order 2003, P 34, A17 (explaining interconnection procedures for a "new Generating Facility," without establishing subcategories). Order 2003 establishes a "single, uniformly applicable interconnection agreement for Large Generators." *Id*. P 11, A11.

C. FERC Orders 888 and 2003: The Commission allows *pro forma* deviations upon a showing that proposed changes are "consistent with or superior to" the default standard

The *pro forma* (i.e., default) standards for non-discriminatory access in transmission service (Order 888) and in interconnections (Order 2003) are subject to an exception. Both orders permit the Commission to allow "deviations" from the default provision if a transmission operator shows that the change is "'consistent with[] or superior to' the terms in the *pro forma* tariff." *Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 296 (D.C. Cir. 2005) *("Sacramento I")* (quoting Order 888, FERC Stats. & Regs. ¶ 31,036, at 31,770); *see also*

Order 2003, PP 26, 825–27, A15–16, 21 (explaining that the standard is the same as that applied in Order 888).

Order 2003's particular "consistent with or superior to" test for reviewing deviations comes with a caveat: it applies only to *non*-independent system operators. Order 2003, PP 26, 825–27, A15–16, 21. The Commission decided that *independent* system operators should be afforded "more flexibility to customize [an interconnection agreement standard] to meet their regional needs." *Id*. P 26, A15–16. It reasoned that "an independent [system operator] does not raise the same level of concern regarding undue discrimination" as a non-independent system operator. *Id*. PP 822, 827, A20–21. Thus, independent operators are subject to a more lenient "independent entity variation" standard. *Id*. PP 26, 827, A15–16, 21.[3] This Court upheld Order 2003 in *National Ass'n of Regulatory Utility Commissioners v. FERC*, 475 F.3d 1277.

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[3] *See also Sw. Power Pool, Inc.*, 171 FERC ¶ 61,270, P 13 (June 30, 2020) (expressly applying the "independent entity variation" test to an independent operator's proposed deviation from the *pro forma* interconnection standard); *Sw. Power Pool, Inc.*, 128 FERC ¶ 61,114, P 12 (2009) (same); *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,025, P 7 (2004) (same).

D. PSColorado—a non-independent system operator—proposes a deviation from Order 2003's default interconnection standard

The Public Service Company of Colorado is a non-independent system operator that provides electric service in the State of Colorado.[4] It also owns 60% of the generation resources on its grid. *See Pub. Serv. Co. of Colo.*, "Order Rejecting Tariff Revisions," 171 FERC ¶ 61,115, PP 36, 38 (May 15, 2020), R.4, JA___, ___ ("Initial Order"). On March 3, 2020, PSColorado submitted, pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d, proposed revisions to the Large Generator Interconnection Procedures in its tariff. *Id*. P 1, JA___. Its deviation from the default standard would streamline the interconnection review process for existing generation resources seeking to replace their generation facilities with new ones.[5] *Id*.

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[4] *See* Colorado Energy Office, "Electric Utilities," *available at* https://energyoffice.colorado.gov/electric-utilities (last accessed Apr. 5, 2021).

[5] PSColorado also proposed revising its Large Generator Interconnection Procedures to more clearly define the process for modifying existing resources. Initial Order, P 8, JA___. The Commission denied that proposal without prejudice to PSColorado resubmitting it separate from the generation replacement proposal. *Id*. P 39, JA___. Only the latter (replacement) proposal is at issue in this appeal.

PSColorado touted its proposal as benefitting owners of existing generation by allowing them to avoid significant time and costs associated with the default interconnection review process. *Pub. Serv. Co. of Colo.*, "Order Addressing Arguments Raised on Rehearing," 172 FERC ¶ 61,297, P 3 (Sept. 30, 2020), R.9, JA___ ("Rehearing Order"). It observed that existing resources have already borne cost responsibility for the physical upgrades necessary to connect to the grid the first time, and the feasibility of those interconnections has already been studied. Initial Order, P 31, JA___. It challenged the default standard's requirement that new, *replacement* generation submit to the full review process again—specifically, where the replacement facility has the same or less energy capacity (megawatts) as the one it replaces, and where it would link to the grid at the same interconnection point. *Id*. PP 15, 17, 31, JA___, ____, ___. PSColorado also argued that its proposal would result in cost savings for ratepayers. *Id*. P 29, JA___.

Finally, as relevant to this appeal, PSColorado acknowledged that its proposal would likely result in more (new) replacements of existing generation resources, and fewer new generation resources connecting to its grid for the first time. *See id*.; *see also* PSColorado Rehearing

Application, FERC Dkt. No. ER20-1153, at 27 (filed June 15, 2020), R.6, JA___ (explaining that, absent approval of PSColorado's proposal, "those [existing] facilities may instead be replaced with new facilities at different locations on the transmission system"); Xcel Energy Servs. Inc., "Transmittal Letter," FERC Dkt. No. ER20-1153, at 13 (filed Mar. 4, 2020), R.3, JA___ (same).

II. The orders on review

The Commission rejected PSColorado's proposal as not "consistent with or superior to" Order 2003's *pro forma*, default interconnection standard. Initial Order, P 34, JA___. It found that because PSColorado owns 60% of the existing generation resources on its grid, its proposal "inherently" favored its own generation over new, third-party resources. Rehearing Order, PP 13, 14, JA___, ___.

The Commission acknowledged the proposal's safeguards against discriminatory conduct. It noted that PSColorado committed to treating interconnection requests filed by both its own existing generation and third-party-owned existing generation equally. *Id*. P 13, JA___; Initial Order, P 28, JA___. And the Commission recognized the purported cost-

saving and transparency benefits of the proposal. *See* Initial Order, PP 24–27, 29, JA___–___, ___.

But the Commission ultimately concluded that these averred benefits did not address the animating goal of the default standard: to "limit opportunities" for system operators like PSColorado "to favor their own generation." *Id*. P 35, JA___ (citing Order 2003, P12, A11–12). Because PSColorado's proposal expedited interconnection reviews for existing generation replacements vis-à-vis *new* generation, its deviation would "inherently favor PSCo[lorado]'s existing generating resources" over at least a subset of third-party-owned generation: new resources seeking to connect for the first time. *Id*. P 36, JA___; Rehearing Order, P 13, JA___. Thus, establishing a two-tiered system would "disproportionately benefit replacement of [PSColorado's] own generation." Rehearing Order, P 13, JA___.

This petition for review followed.

SUMMARY OF ARGUMENT

PSColorado proposed converting FERC Order 2003's default interconnection review standard—applicable to all new generation interconnections—into a two-track system. Existing generation

resources seeking to replace their aging facilities with new ones would enjoy an expedited interconnection review process. Non-replacement new generation seeking to break into the market and compete would, by contrast, be subject to the default, more involved and costly process.

The Commission reasonably found that PSColorado's proposed deviation from the default, *pro forma* standard fails Order 2003's "consistent with or superior to" test. By fast-tracking reviews for existing generation only, PSColorado's proposal inherently favors its own resources over independently-owned *new* generation. It matters not that, as PSColorado asserts, its proposal includes safeguards to prevent discrimination *among* existing generation—i.e., as between the third-party-owned 40% and the PSColorado-owned 60%. Its proposal still benefits its own generation over *new* resources seeking to interconnect for the first time. Thus, PSColorado's proposal does worse than the default standard in meeting Order 2003's goals of (1) limiting opportunities for system operators to favor their own generation, and (2) expanding opportunities for new generation to enter the market. That conclusion deserves substantial deference, both as a reasonable

application of Order 2003's "consistent with or superior to" test, and as a judgment involving regulatory policy at the core of FERC's mission.

PSColorado does not directly confront the Commission's finding. Instead, it relitigates precedent already decided, makes inapt comparisons to independent system operators, and faults the Commission for departing from precedent it had not yet issued when the orders under review were issued.

First, PSColorado argues that the Commission unlawfully departed from its precedent approving a deviation for an *independent* system operator—the Midcontinent Independent System Operator, Inc. But that argument fails because Order 2003 resolved with finality that independent and non-independent operators are not similarly situated. PSColorado's contrary argument is, fundamentally, a collateral attack on Order 2003's separate tests for assessing *pro forma* deviations—a challenge lodged 18 years too late.

Second, PSColorado argues that the Commission's decision unlawfully departs from a *future* order, where it approved a *pro forma* deviation for another non-independent system operator, Dominion Energy South Carolina, Inc. But reviewing courts do not reach out to

subsequently-issued orders in assessing the reasonableness of an earlier decision. The pertinent question is whether the Commission departed from a *prior* agency decision, not whether it issued a decision that is inconsistent with a future order.

Ultimately, and fatally, PSColorado points to no order predating the orders on judicial review where the Commission granted a similar deviation for another non-independent system operator. Thus, the gravamen of its claim on appeal—a perceived unlawful departure from Commission precedent—fails.

ARGUMENT

I. Standards of review

The Court reviews FERC orders under the deferential arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *NextEra Energy Res., LLC v. FERC*, 898 F.3d 14, 20 (D.C. Cir. 2018). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. "Rather, the court must uphold a rule if the agency has examined the relevant considerations and articulated a

satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id*. (cleaned up).

Under this standard, "[t]he Commission's factual findings are conclusive if supported by substantial evidence." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011) (internal quotation marks omitted). It "requires more than a scintilla but less than a preponderance of evidence." *South Carolina*, 762 F.3d at 54 (internal quotation marks omitted). Further, the question is not "whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision." *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010).

Finally, the Court accords deference to the Commission's interpretation of its own precedent. *See Int'l Transmission Co. v. FERC*, 988 F.3d 471, 481 (D.C. Cir. 2021) (citing *Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015)).

II. The Commission reasonably found that PSColorado's proposed deviation is not "consistent with or superior to" Order 2003's default standard

As early as 1996, the Commission resolved that, when it comes to opportunities for transmission owners "to discriminate in their own favor," independent and non-independent system operators are not alike. *See Midwest*, 373 F.3d at 1364. The Commission's landmark Order 888 (ultimately upheld by the Supreme Court) recognized that control over transmission grid operations vested in transmission-owning utilities—like PSColorado—"contribute[s] to inefficiencies that impede[] free competition in the market for electric power." *Id*. And even though Order 888 required all such utilities to offer transmission service on an "open-access, non-discriminatory basis," FERC still found "lingering opportunities for transmission owners to discriminate in their own favor." *Id.*

It is no surprise, then, that FERC's Order 2003 expressly affirms the distinction between independent and non-independent system operators in the context of electric grid interconnections. The Commission explained that, because independent operators are "less likely to act in an unduly discriminatory manner" in "favor of their own

generation" (of which they own none), the test for assessing deviations from the *pro forma*, default interconnection standard is relaxed. *See* Order 2003, PP 12, 26, 827, A11–12, 15–16, 21; *see also Midwest*, 373 F.3d at 1364 (explaining that independent system operators administer an electric grid whose physical components are owned by member utilities). Independent operators thus have "greater flexibility" to fashion their own interconnection standards than do non-independent operators (*see supra* p.12 n.3), whose proposed deviations must pass the more demanding "consistent with or superior to" test. Order 2003, PP 26, 825–26, A15–16, 21; *see also* Initial Order, P 34, JA___ (applying this test).

This Court has recognized the dissimilarity between independent and non-independent operators every step of the way. *See Midwest*, 373 F.3d at 1364–65 (collecting cases). Indeed, this Court did so in the specific context of Order 2003 some 14 years ago. *See Nat'l Ass'n,* 475 F.3d 1277. There, in upholding the Commission's Order 2003 interconnection rule, the Court explained that the Order's "standard [interconnection] agreement" would "prevent[]" non-independent system

operators "from favoring affiliated generators over independents in interconnection." *See id*. at 1279.

PSColorado's brief rests on the premise that FERC unlawfully departed from its precedent by rejecting PSColorado's proposed deviation from the default interconnection standard, after approving the Midcontinent Independent System Operator, Inc.'s ("Midcontinent") own proposal. Br. 42–47. But PSColorado is fighting yesterday's battles. Because the two system operators—one independent, one not—are conclusively *not* "similarly situated," the Commission was not required to treat them the same. *See Baltimore Gas & Elec. Co. v. FERC*, 954 F.3d 279, 283 (D.C. Cir. 2020). *Cf. ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024–25 (D.C. Cir. 2018) (requiring explanation for disparate treatment of two "virtually indistinguishable" entities).

PSColorado is also fighting tomorrow's battles. It argues that the Commission departed from its later-in-time order approving Dominion Energy South Carolina, Inc.'s ("Dominion Energy") proposed deviation from the default standard. Br. 40–41. True, Dominion Energy is, like PSColorado, a non-independent system operator. But the Dominion Energy order "is not before [the Court]," *Sacramento I*, 428 F.3d at 298,

and in any event, the Commission's orders on review could not have departed from a *future* order not-yet-issued, *Baltimore Gas*, 954 F.3d at 283; *see also Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (the Court "will not reach out to examine a decision made after the one actually under review" (internal quotation marks omitted)).

PSColorado's focus on battles already lost and future ones not yet waged obscures the relevant issue in *this* appeal: whether PSColorado's proposed deviation is "consistent with or superior to" Order 2003's default standard, such that it equally or better "limit[s] opportunities for [PSColorado] to favor [its] own generation." Order 2003, PP 12, 26, 825–27, A11–12, 15–16, 21; Initial Order, PP 34–35, JA___–___. The Commission reasonably deemed the answer to be "no." By shunting interconnection requests made by existing generation resources—of which PSColorado owns 60% in the region—into a new, fast-track review process, PSColorado's proposal "inherently favor[s] PSCo[lorado]'s existing generating resources" over independently owned *new* generation resources. Rehearing Order, P 13, JA___.

A. PSColorado bore the burden of showing that its proposal would favor its own generation resources less than or as little as the default standard

PSColorado stumbles straight out of the gate by misstating the standard of review. It argues that the Commission bears the burden of showing "the discriminatory consequences" of PSColorado's proposal, with "either actual evidence of undue discrimination or an economic theory" showing that undue discrimination is likely. Br. 30, 37.

That has the burden-of-proof exactly backwards. PSColorado relies on *Ameren Services Co. v. FERC*, but that case involved a Commission-initiated investigation into the lawfulness of a system operator's tariff under *section 206* of the Federal Power Act, 16 U.S.C. § 824e. 880 F.3d 571, 576–77 (D.C. Cir. 2018). Here, PSColorado initiated the proceeding on review by filing its own proposal, which it was required to do under *section 205* of the Act, 16 U.S.C. § 824d. Initial Order, P 1, JA___.

That distinction is critical. An "important difference between section 205 and section 206 is the burden of proof." *Emera Me. v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) (internal quotation marks and alteration omitted). "A utility filing a rate adjustment under section 205 must

show that the adjustment is *lawful*." *Id*.; *see also Int'l Transmission*, 988 F.3d at 483. Section 206 proceedings, by contrast, are initiated by a third-party complainant or by FERC itself. *Int'l Transmission*, 988 F.3d at 483. Section 206's procedures "'are entirely different and stricter than those of section 205.'" *Id*. (quoting *Emera Me.*, 854 F.3d at 24) (internal quotation marks omitted). "Unlike in a Section 205 proceeding, the proponent of a rate change under Section 206 'bears the burden of proving that the existing rate is *unlawful*.'" *Id*. (quoting *Emera Me.*, 854 F.3d at 24) (emphasis in *Emera Me.*; internal quotation marks omitted).

Thus, in the Federal Power Act section 206 proceeding at issue in *Ameren*, the Commission had to show that its modification to Midcontinent's tariff was necessary to prevent undue discrimination. *See Ameren*, 880 F.3d at 578. In this section 205 proceeding, by contrast, it is the applicant utility, PSColorado, that must show its proposal is "consistent with or superior to" Order 2003's default standard in "limit[ing] opportunities for [PSColorado] to favor [its] own generation." Order 2003, P 12, A11–12. It is not *the Commission's* burden to prove an *in*consistency with Order 2003. And because PSColorado's proposal

inherently favors its own resources by fast-tracking the interconnection process for existing generation, the Commission reasonably found that PSColorado did not meet its burden. Initial Order, PP 35–37, JA___–___; Rehearing Order, P 13, JA___.

Irrespective of the burden-of-proof issue, PSColorado also misapplies *Ameren* on its own terms. Indeed, the facts there are the converse of those here. In *Ameren*, all but one of the utilities implicated did *not* own generation resources. 880 F.3d at 578. PSColorado, by contrast, is the only utility in this case, and it owns *most* of the generation on its grid. Rehearing Order, P 13, JA___. Further, in *Ameren*, the Commission "did not pay any attention to th[e] small exception" of the lone generation-owning utility, leaving it with little basis for finding discriminatory risk. 880 F.3d at 578. Here, the Commission anchored its finding securely *in* PSColorado's generation ownership. Rehearing Order, P 13, JA___.

Finally, the evidence in *Ameren* was consistent with the "broader trend following Orders No. 888 and 2000," which "has been toward divestiture by transmission owners of generation assets." 880 F.3d at 578. In that context, where the facts were nothing like "'the bad old

days'" of vertical integration, FERC had to do more than simply speculate about possible transmission owner discrimination of generation resources. *Id*. (quoting *Midwest*, 373 F.3d at 1363). PSColorado, by contrast, still owns 60% of the generation on its grid.

B. Substantial evidence supports the Commission's finding that PSColorado's proposal "inherently" confers a preference on its own generation resources

1. The Commission applies Order 2003's "consistent with or superior to" test to a non-independent system operator's proposed deviation from Order 2003's default interconnection standard. Order 2003, PP 825–27, A21; *see also* Initial Order, P 34, JA___; Rehearing Order, P 9, JA___. Deciding whether a deviation satisfies that test turns largely on whether it equally or better achieves the default standard's goals. *See Sacramento I*, 428 F.3d at 296–97 (in applying the "consistent with[] or superior to" test, "[t]he Commission found the California [independent system operator's] tariff consistent with the broad non-discrimination goals of Order No. 888"). Thus, PSColorado's two-tiered system for new and existing generation resources must be at least as good at "(1) limit[ing] opportunities for [PSColorado] to favor [its] own generation," and at "(2) facilitat[ing] market entry for generation

competitors by reducing interconnection costs and time." Order 2003, P 12, A11–12; Initial Order, P 35, JA___.

The first goal in particular is prophylactic in nature. By seeking to "limit opportunities" for transmission operators to favor their own generation, Order 2003 seeks to preemptively inhibit such conduct. *See* Order 2003, P 12, A11–12. Indeed, the Commission designed Order 2003 to "*prevent[]* transmission facility owners from favoring affiliated generators over independents in interconnection." *See Nat'l Ass'n*, 475 F.3d at 1279 (emphasis added). Driving Order 2003's remedy is the prognosis that, absent such protective measures, the risk of preferential treatment by non-independent system operators—i.e., the entities reviewing interconnection requests—is unacceptably high. *See* Order 2003, P 12, A11–12 (explaining that the default standard would "minimize *opportunities* for undue discrimination" (emphasis added)). Thus, for PSColorado's proposal to be "consistent with or superior to" Order 2003's default standard, PSColorado must show that it matches or bests that standard in preventing such favoritism.

2. Measured against this yardstick, the Commission reasonably rejected PSColorado's proposal. By expediting assessments of

interconnection requests made by its own generation resources, PSColorado's proposal *expands* "opportunities" to "favor [its] own generation." *See* Order 2003, P 12, A11–12. Indeed, redirecting replacements of existing generation—of which PSColorado owns 60%—into a streamlined review process "*inherently* favor[s] PSCo[lorado]'s existing generating resources" over at least a subset of independent competitors: new resources. Rehearing Order, P 13, JA___ (emphasis added). As PSColorado itself acknowledges, new resources seeking to interconnect for the first time would remain subject to the more costly, more involved default review process. *See* Br. 32; Initial Order, P 36, JA___.

PSColorado fails to rebut this conclusion, either in its rehearing application to the agency or in its opening brief to this Court. *See Fox v. Gov't of D.C.*, 794 F.3d 25, 29 (D.C. Cir. 2015) ("[An] argument first appearing in a reply brief is forfeited."). At most, PSColorado observes that its proposal does not alter the default interconnection review process for new generation. Br. 32–33. But that says nothing about whether changing the process for *existing* resources seeking to replace

their facilities "favor[s]" PSColorado's generation over new resources. *See* Order 2003, P 12, A11–12.

Indeed it does—a fact that PSColorado implicitly admits. In both its initial proposal and in its rehearing application to FERC, PSColorado goes so far as to predict that, without its proposed two-track system, "those [existing] facilities may instead be replaced with new facilities at different locations on the transmission system." PSColorado Rehearing Application at 27, JA___; Xcel Transmittal Letter at 13, JA___ (same); Initial Order, P 29, JA___; *see also* Br. 22 (suggesting that "existing facilities" specifically "could benefit" from its proposal's "streamlined procedures"). In this way, approving PSColorado's deviation also undercuts Order 2003's second goal by "mak[ing] it more difficult for [PSColorado's] generation competitors to enter the market." Initial Order, P 35, JA___; *see also* Order 2003, P 12, A11–12.

In short, because PSColorado's proposal inherently favors existing generation on its grid, substantial evidence supports FERC's finding that PSColorado's resources "stand to disproportionately benefit … over developers or owners of third-party generation." Rehearing Order, P 13, JA___; *see also* Initial Order, PP 36–37, JA___–___; *Murray Energy*, 629

F.3d at 235. Accordingly, the Court should uphold the Commission's conclusion that PSColorado's proposal is not "consistent with or superior to" Order 2003's default standard. Initial Order, PP 34–35, JA___–___, Rehearing Order, P 13, JA___. That determination "is entitled to substantial deference, both as an interpretation of the parameters set by FERC's own orders,"—namely, the FERC Order 2003 interconnection rule—"and as a judgment involving regulatory policy at the core of FERC's mission." *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 533 (D.C. Cir. 2010) *("Sacramento II")* (internal citations omitted); *accord Int'l Transmission*, 988 F.3d at 481; *see also La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 370 (D.C. Cir. 1998) (FERC is owed deference for its predictions "about the future impact of its own regulatory policies").

3a. PSColorado offers several legal and factual counterarguments, none of which are persuasive. Legally, it contends that the Commission erred in discerning an undue preference for its own existing generation because unaffiliated new generation is not "similarly situated." Br. 33; *see also* Rehearing Order, P 13, JA___. And because the Commission is not barred from treating entities *not* similarly situated differently,

Transmission Access Policy Study Grp. v. FERC, 225 F.3d 667, 721 (D.C. Cir. 2000), *aff'd sub nom.*, *New York v. FERC*, 535 U.S. 1 (2002), PSColorado reasons that expediting interconnection requests for existing generation cannot amount to undue discrimination contra requests submitted by new generation, *see* Br. 33.

Not so. That new and existing generation are not similarly situated does not decide the lawfulness of PSColorado's proposal. If two entities *are* similarly situated, then the Commission generally may not treat them differently. *See State Corp. Comm'n of Kan. v. FERC*, 876 F.3d 332, 335 (D.C. Cir. 2017). But that does not mean the converse is necessarily true—i.e., that any proposal treating two entities *not* similarly situated differently *is* lawful. The relevant inquiry is whether PSColorado's proposal meets Order 2003's "consistent with or superior to" test, such that it does not "favor [its] own generation." Order 2003, P 12, A11–12. It is not whether, as a general matter, new and existing resources are similarly situated. *See* Order 2003, PP 12, 825–27, A11–12, 21; Rehearing Order, P 13, JA___.

This Court has indicated as much. In upholding Order 2003 as a lawful construction of the Federal Power Act, *National Ass'n* expressly

recognized that the Order targets proprietary favoritism in interconnections generally; its purpose is to "prevent[] transmission facility owners from favoring affiliated generators over independents in interconnection." 475 F.3d at 1279. Neither *National Ass'n* nor Order 2003 admits of an exception *permitting* favoritism of a system operator's existing generation so long as it does so over new, third-party generation.

3b. PSColorado also argues that, factually, its proposal lifts all boats by helping existing and new generation resources alike. *See* Br. 34. It arrives at the conclusion from two directions. First, PSColorado speculates that its proposal might be "competition-neutral" because new generation will eventually become existing generation, meaning those resources too will ultimately benefit from the expedited review process. *Id*. PSColorado did not raise this argument in its agency rehearing application, meaning it is jurisdictionally forfeited. *See, e.g.*, *New England Power Generators Ass'n v. FERC*, 879 F.3d 1192, 1198 (D.C. Cir. 2018) (citing 16 U.S.C. § 825*l*(b)) ("[T]he party seeking judicial review must have raised in its rehearing request before the Commission each objection it puts down before the reviewing court."). It

also fails on the merits. A new resource only becomes an existing resource if it has interconnected in the first place. Yet, as the Commission reasonably found and PSColorado acknowledges, its proposal favors interconnections by existing generators seeking to replace their facilities. *See supra* pp.29–31.

Second, PSColorado asserts that its proposed changes would free-up capacity to review new generation requests by removing existing generation interconnection requests from the default queue. Initial Order, P 24, JA___; Br. 15, 34. And it notes its proposal's clarification of the default interconnection process, its anti-discrimination safeguards, and its potential for cost savings. Initial Order, PP 26–29, JA___; Br. 14–15, 34.

The Commission expressly recognized the PSColorado proposal's putative benefits. *See* Initial Order, PP 24–30, JA___–___; Rehearing Order, P 13, JA___. But it found them inapt because the proposed changes "inherently" favor PSColorado's own generation over at least some independent generation—*new* resources seeking to interconnect for the first time. *See* Initial Order PP 35–36, JA___–___, Rehearing Order, P 13, JA___. As a consequence, even if PSColorado were correct

that its proposal might expedite reviews of new interconnection requests, its own existing generation still "stand[s] to *disproportionately* benefit" over new generation. Rehearing Order, P 13, JA___ (emphasis added).

In fact, PSColorado's proposal disadvantages new generation not just in relative terms—which suffices to uphold the Commission's decision—but also in absolute terms. As discussed, PSColorado asserts that, under its proposal, existing generation replacements might *supplant* new generation interconnections that would have otherwise occurred. *See supra* p.31 (quoting PSColorado Rehearing Application at 27, JA___; Xcel Transmittal Letter at 13, JA___).

4. Amicus Edison Electric Institute (the "Institute") also espies environmental benefits in PSColorado's proposal. Edison Electric Institute Amicus Brief at 13–18. But environmental impacts say nothing about the proposal's capacity to "minimize opportunities" for PSColorado "to favor [its] own generation" "consistent with or superior to" Order 2003's default standard. *See* Order 2003, PP 12, 825–26, A11–12, 21. And, in any case, the claimed environmental benefits are uncertain. While the Institute correctly observes that Midcontinent's

similar proposal received broad support, it did not enjoy universal backing from environmental groups—the Sierra Club, among other interests, opposed it. *See generally* Sierra Club Protest, FERC Dkt. No. ER19-1065 (filed Mar. 26, 2019); *see also Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,146, PP 29–38 (2019) *("Midcontinent")*.

The Institute also invokes the Federal Power Act's "robust enforcement mechanisms" as assurance enough that any concerns over discriminatory conduct are unwarranted. *See* Amicus Brief of Edison Electric Institute at 20–23. But corrective measures do not meet Order 2003's aim of "*preventing*" discriminatory conduct in the first place. *See Nat'l Ass'n*, 475 F.3d at 1279 (emphasis added). As discussed (*supra* p.29), Order 2003's default standard is prophylactic in nature; it is designed to "limit *opportunities*" for non-independent system operators to "favor their own generation." Order 2003, P 12, A11–12 (emphasis added). After-the-fact enforcement mechanisms, no matter how "robust," are a poor fit.

In any event, the Court may find that the Institute's lengthy discussion of the Federal Power Act's enforcement provisions is not properly before it. "Ordinarily, [the Court] w[ill] not entertain an

amicus' argument if not presented by a party." *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994); *see also EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016). Yet PSColorado itself makes only a glancing, unsupported reference to penalties that may be imposed for unlawful conduct. Br. 39. That falls short of presenting the issue with the specificity necessary to invoke this Court's review. *See, e.g.*, *SEC v. Banner Fund Int'l*, 211 F.3d 602, 613 (D.C. Cir. 2000) (quoting Fed. R. App. P. 28(a)[(8)](A)).

5. PSColorado also discerns unreasoned decisionmaking in the Commission's allegedly contradictory statements endorsing and then discounting the proposal's purported benefits. Br. 34. But PSColorado mischaracterizes the Commission's orders. Notwithstanding PSColorado's assertions, FERC made no "finding" that "PSCo[lorado]'s proposal 'will help new interconnection customers ….'" Br. 34 (quoting Initial Order, P 24, JA___). FERC merely recounted *PSColorado's* own finding: "PSCo[lorado] states that its proposal will help new interconnection customers …." Initial Order, P 24, JA___; *see also id*. PP 24–30, JA___–___ (summarizing claimed benefits).

PSColorado compounds its error by also (mis)stating that FERC, in the Rehearing Order, "agree[d] with PSCo[lorado] that its proposal would generate these benefits." Br. 34 (citing Rehearing Order, P 14, JA___). But the Commission did no such thing. In response to PSColorado's assertion that FERC failed to "consider the benefits of PSCo[lorado]'s proposal," the Commission stated only that it had, in fact, "recognized the potential benefits of PSColorado's proposal." Rehearing Order, P 14, JA___. Nowhere did the Commission endorse PSColorado's own assertion of benefits. *See* Initial Order, PP 24–30, JA___–___; Rehearing Order, PP 13–14, JA___–___ (recognizing that "PSCo[lorado]'s proposed revisions *may* feature safeguards against patent undue discrimination" (emphasis added)).

Finally, even assuming that PSColorado is correct that its proposal's anti-discrimination safeguards support approval, the relevant question is not "whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision." *Fla. Gas*, 604 F.3d at 645. Because substantial evidence shows that PSColorado's proposal inherently favors its own generation over new, third-party resources, the Commission's "ultimate

decision" reasonably rejected it as not "consistent with or superior to" Order 2003's default standard. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 782.

III. The Commission did not unlawfully depart from binding precedent

"On arbitrary and capricious review, FERC bears the burden 'to provide some reasonable justification for any adverse treatment relative to similarly situated competitors.'" *Baltimore Gas*, 954 F.3d at 283 (quoting *ANR Storage*, 904 F.3d at 1025). "To determine whether an agency must justify a prior contrary decision, therefore, [the Court] ask[s] whether the regulated parties at issue are 'similarly situated.'" *Id*. (collecting cases).

A. Midcontinent is not similarly situated to PSColorado

PSColorado argues that the Commission unlawfully departed from its *Midcontinent* decision (167 FERC ¶ 61,146), where it approved an independent system operator's similar deviation from the default interconnection standard. Br. 42–43. It reasons that the Commission did not apply the "independent entity variation" test in that case, and so

it cannot rely on a different test to distinguish its ruling here.[6] Br. 43. PSColorado also devotes several pages to arguing that the "independent entity variation" test is unclear, notwithstanding that the distinct "consistent with or superior to" test applies in this matter. *See* Br. 43–46. And it reasons that, ultimately, none of this matters anyway because the only relevant test is the *statute's* prohibition on undue preferencing—not Order 2003's "sub-statutory" rule. Br. 46–47.

1. PSColorado's arguments lack merit. As a first matter, the Commission's mode of analysis in *Midcontinent*—including whether it applied the "independent entity variation" test—is not at issue: the Midcontinent proposal is not before the Court. *See Sacramento I*, 428 F.3d at 298. *Midcontinent*'s relevance is, instead, a function of whether the independent system operator there is "similarly situated" to the non-independent system operator here, PSColorado. *Baltimore Gas*, 954 F.3d at 283.

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[6] PSColorado also cites FERC's approval of another independent system operator's substantially similar proposed deviation from Order 2003's *pro forma* standard—that of the Southwest Power Pool, Inc. Br. 23–24. And there, the Commission expressly applied the "independent entity variation" test. *Sw. Power* Pool, 171 FERC ¶ 61,270, P 13.

It is not. Discrimination between two entities "does not alone make [a FERC decision] arbitrary and capricious; rather, *[a] petitioner[] must show* that there is no reason for the difference." *Transmission Access*, 225 F.3d at 721 (emphasis added), *aff'd sub nom.*, *New York v. FERC*, 535 U.S. 1. The Commission enjoys broad discretion in deciding whether two entities are similarly situated, *id*., and its factual findings "are conclusive if supported by substantial evidence," *South Carolina*, 762 F.3d at 54.

PSColorado fails to meet its burden of showing "no reason for the difference" in treatment between Midcontinent and itself. In fact, the evidence points sharply the other way. Unlike PSColorado, Midcontinent owns no generation on its system, meaning there exists no concern that Midcontinent—the regional system operator—could "favor [its] own generation" in its evaluation of interconnection requests under a two-tiered review process. Order 2003, P 12, A11–12; Initial Order, P 38, JA___; Rehearing Order, P 13, JA___.

Further, contrary to PSColorado's assertions, the fact that investor-owned utilities own 64% of their own generation resources on the Midcontinent system is irrelevant. *See* Br. 36. Those entities have

no say in assessing interconnection requests. Thus, any proposal by Midcontinent to streamline *its* review of existing resource interconnections is not fraught with the same concerns of proprietary preferencing. *See* Rehearing Order, P 13, JA___. Indeed, by its terms, Order 2003 is designed to prevent "*Transmission Providers*" specifically—i.e., system operators like Midcontinent and PSColorado—from "favor[ing] their own generation." Order 2003, P 12, A11–12 (emphasis added).

Midcontinent and PSColorado are dissimilar for a more fundamental reason too: Order 2003 said so with finality 18 years ago. There, the Commission found that independent system operators (like Midcontinent) are "less likely to act in an unduly discriminatory manner than a Transmission Provider that is a market participant"—i.e., one (like PSColorado) that owns generation on the grid it administers. Order 2003, PP 26, 827, A15–16, 21; Initial Order, P 38, JA___. Order 2003 also prescribes different tests governing assessments of proposed deviations from the default interconnection standard for independent and non-independent system operators.

Order 2003, PP 26, 825–27, A15–16, 21; Initial Order, PP 34, 38, JA___, ___.

Accordingly, after Order 2003—and this Court's affirmance of that Order 14 years ago—there exists no reasonable basis for finding that Midcontinent and PSColorado *are* similarly situated. And that means the Commission's rejection of PSColorado's proposed deviation is not an unlawful departure from its approval of Midcontinent's own deviation from the default interconnection standard. *See Baltimore Gas*, 954 F.3d at 283.

2. After spending several pages arguing that Midcontinent and itself are, in fact, alike in relevant part, PSColorado turns to attacking Order 2003 head-on. It tries to dismiss Order 2003's two tests for reviewing deviations from the default standard as merely "sub-statutory," and asserts that the only applicable standard is the statute's uniform mandate of "just and reasonable rates" and its prohibition on granting any "undue preference." 16 U.S.C. § 824d(a)–(b); Br. 46.

PSColorado's theory is incorrect. First, it drains Order 2003's distinct tests for independent and non-independent operators of independent meaning. *Cf. City of Roseville v. Norton*, 348 F.3d 1020,

1028 (D.C. Cir. 2003) (eschewing statutory interpretations that result in surplusage). Second, it fails to recognize that compliance with Order 2003's separate tests for independent and non-independent operators determines *whether* a practice complies with the Federal Power Act's requirements. *See* Order 2003, PP 18–20, 825–27, A13–14, 21.

At bottom, PSColorado's argument is really a collateral attack on Order 2003's two tests for approving deviations from the default standard. PSColorado repeatedly questions whether Order 2003's "two different [tests]" are lawful, and urges the Court to consider jettisoning at least one of them as inconsistent with the Federal Power Act. Br. 46–47. But PSColorado's challenge to Order 2003 and its governing tests arrives at the courthouse doors years too late. "With few exceptions, a challenge made outside of the [60-day] statutory period is a collateral attack over which [the Court] ha[s] no jurisdiction." *Pac. Gas & Elec.*, 533 F.3d at 824–25 (citing *Sacramento I*, 428 F.3d at 298–99, and 16 U.S.C. § 825*l*(b)).

Pacific Gas & Electric also involved an untimely challenge to the Commission's Order 2003 interconnection rule. There, in a proceeding that post-dated judicial review of Order 2003, Pacific Gas & Electric

argued that the Order's requirement that a particular entity perform interconnection studies violated the Federal Power Act. *Id*. at 824. But because the disputed requirement "was first announced not in the orders below, but rather in the Order No. 2003 series, which [Pacific Gas] did not challenge on that ground," the Court deemed Pacific Gas's claim an impermissible collateral attack on Order 2003. *Id*. at 824–25.

So too here. The "independent entity variation" and "consistent with or superior to" tests "w[ere] first announced not in the orders below, but rather in the Order No. 2003 series, which [PSColorado] did not challenge on that ground." *See id*. at 824. And even if it had challenged the tests back then, it would be of no moment today because the Court upheld Order 2003 14 years ago—thus extinguishing any lingering doubt that the distinct tests are lawful and binding. What's more, Order 2003 states the two tests expressly, leaving no question which test applies to independent and non-independent system operators. *See* Order 2003, PP 825–27, A21; *cf. Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122, 1127 (D.C. Cir. 2011) (finding no collateral attack where, prior to the orders on review, FERC had never "express[ed] the supposedly governing principle").

* * *

Ultimately, "[w]hile cloaked in the guise of a challenge to the orders below," PSColorado seeks to fight yesterday's battles by relitigating Order 2003. *See Pac. Gas & Elec.*, 533 F.3d at 822. Because the time has long-since expired to challenge that Order, however, this panel's charge is more straightforward. The pertinent question is only whether the Commission reasonably applied Order 2003's "consistent with or superior to" test to PSColorado's proposal. For the reasons discussed *supra* pp.28–36, the answer is "yes."

B. The Commission could not have departed from a future order not-yet-issued

PSColorado also looks to a post-decisional Commission order to discern unreasoned decisionmaking here. It invokes the Commission's order in *Dominion Energy South Carolina, Inc.*, 173 FERC ¶ 61,171 (Nov. 23, 2020), where, it argues, the Commission approved a substantially similar deviation from Order 2003's default standard for another non-independent system operator. Br. 40.

PSColorado's reliance on a decision that post-dates the orders on review highlights a key fact in this appeal: the absence of *any* prior FERC decision approving a similar deviation for a non-independent

system operator. Indeed, the Commission issued its *Dominion Energy* order almost two months after the *PSColorado* Rehearing Order and the close of the agency record in this proceeding.

Because the *Dominion Energy* order was "made after the [orders] actually under review," the Court "will not reach out to examine [it]." *Brooklyn Union*, 409 F.3d at 406 (internal quotation marks omitted). By the same token, the Commission could not have unlawfully departed from an order not-yet-issued. Assuming PSColorado and Dominion Energy are, in fact, "similarly situated"—a prerequisite to finding an unlawful departure from precedent—the Commission need only "justify a *prior* contrary decision." *See Baltimore Gas*, 954 F.3d at 283 (emphasis added); *supra* pp.23–24. It is not also bound *ex ante* to orders from the future.

In any event, it is worth noting that the Commission *did* distinguish the two utilities in *Dominion Energy*. It explained that, unlike PSColorado, Dominion Energy included in its proposal an independent entity to administer the expedited existing generation replacement interconnection process in a non-discriminatory manner. *Dominion Energy*, 173 FERC ¶ 61,171, PP 14–15, 24. The Commission

found that this feature assuaged concerns of an undue preference in favor of Dominion Energy's own generation resources. *See id*. P 24. Whether that distinction is, in fact, a meaningful one is a question properly presented in any later judicial challenge of the *Dominion Energy* order—not those orders on review in this appeal. *Baltimore Gas*, 954 F.3d at 283.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

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April 5, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B), because this brief contains 8,515 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in New Century Schoolbook 14-point font using Microsoft Word 365.

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April 5, 2021

ADDENDUM

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Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency pro-

§ 824c. Issuance of securities; assumption of liabilities

(a) Authorization by Commission

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

(b) Application approval or modification; supplemental orders

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(g) Inaction of Commissioners

(1) In general

With respect to a change described in subsection (d), if the Commission permits the 60-

day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825*l*(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

(2) Appeal

If, pursuant to this subsection, a person seeks a rehearing under section 825*l*(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825*l*(b) of this title.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142; Pub. L. 115–270, title III, § 3006, Oct. 23, 2018, 132 Stat. 3868.)

AMENDMENTS

2018—Subsec. (g). Pub. L. 115–270 added subsec. (g).

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order re-

funds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms ''electric utility companies'' and ''registered holding company'' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term ''short-term sale'' means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term ''applicable Commission rule'' means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Pub. L. 100–473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub. L. 109–58, title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 1295(b)(1), substituted ''hearing held'' for ''hearing had'' in first sentence.

Subsec. (b). Pub. L. 109–58, § 1295(b)(2), struck out ''the public utility to make'' before ''refunds of any amounts paid'' in seventh sentence.

Pub. L. 109–58, § 1285, in second sentence, substituted ''the date of the filing of such complaint nor later than 5 months after the filing of such complaint'' for ''the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period'', in third sentence, substituted ''the date of the publication'' for ''the date 60 days after the publication'' and ''5 months after the publication date'' for ''5 months after the expiration of such 60-day period'', and in fifth sentence, substituted ''If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision'' for ''If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision''.

[1] See References in Text note below.

Subsec. (e). Pub. L. 109–58, § 1286, added subsec. (e).

1988—Subsec. (a). Pub. L. 100–473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100–473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice.''

LIMITATION ON AUTHORITY PROVIDED

Pub. L. 100–473, § 3, Oct. 6, 1988, 102 Stat. 2300, provided that: ''Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].''

STUDY

Pub. L. 100–473, § 5, Oct. 6, 1988, 102 Stat. 2301, directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, § 207, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Request for inventory and cost statements

Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, § 208, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824h. References to State boards by Commission

(a) Composition of boards; force and effect of proceedings

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Cooperation with State commissions

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and

Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, §311, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided

in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

On Rehearing Standardization of Generator Interconnection Agreements and Procedures, F.E.R.C., March 5, 2004

104 FERC P 61103 (F.E.R.C.), 2003 WL 21725988

FEDERAL ENERGY REGULATORY COMMISSION
***1 Commission Opinions, Orders and Notices**

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, and Nora Mead Brownell.

Standardization of Generator Interconnection Agreements and Procedures

Docket No. RM02-1-000
FINAL RULE
(Issued July 24, 2003)

ORDER NO. 2003

I. INTRODUCTION

1. This Final Rule requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file standard procedures and a standard agreement for interconnecting generators larger than 20 MW. The Commission expects that this Final Rule will prevent undue discrimination, preserve reliability, increase energy supply, and lower wholesale prices for customers by increasing the number and variety of new generation that will compete in the wholesale electricity market.

2. This Final Rule requires public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to file revised open access transmission tariffs (OATTs) to add Standard Large Generator Interconnection Procedures (Final Rule LGIP)[1] and a Standard Large Generator Interconnection Agreement (Final Rule LGIA).[2] Any non-public utility that seeks voluntary compliance with the reciprocity condition of an open access transmission tariff may satisfy this condition by adopting this Agreement and these procedures.

3. The Final Rule LGIP sets forth the procedures that Interconnection Customers and Transmission Providers are required to follow during the interconnection process.[3] The Final Rule LGIA sets forth the legal rights and obligations of each Party, addresses cost responsibility issues, and establishes a process for resolving disputes.

4. The Federal Energy Regulatory Commission's (Commission's) authority to require the addition of the Final Rule LGIA and Final Rule LGIP to the OATT derives from its findings of undue discrimination in the interstate electric transmission market that formed the basis for Order No. 888.[4] The Commission here adopts standard procedures and a standard agreement to be used by Transmission Providers with Interconnection Customers proposing to interconnect a generator of more than 20 MW to sell energy at wholesale in interstate commerce. The Final Rule LGIP and Final Rule LGIA apply to any new Interconnection Request to a Transmission Provider's Transmission System.[5] The Commission is not requiring any retroactive changes to individual (versus generic) interconnection agreements filed with the Commission prior to the effective date of this Final Rule.

A. Background

5. The electric power industry continues to be in transition. Where the industry once comprised mainly large, vertically integrated utilities providing bundled power at cost-based rates, companies selling unbundled wholesale power at rates set by competitive markets have now become common. Balanced market rules and sufficient infrastructure are essential for achieving power markets that will provide customers with reasonably priced and reliable service.

***2** 6. The Commission continues to work to encourage fully competitive bulk power markets. The effort took its first major step with Order No. 888, which required public utilities to provide other entities comparable access to their facilities for transmitting electricity in interstate commerce, and continued with Order No. 2000,[6] which encouraged the development of Regional Transmission Organizations (RTOs).

7. In this proceeding the Commission, pursuant to its responsibility under Sections 205 and 206 of the Federal Power Act (FPA) to remedy undue discrimination, requires all public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to append to their OATTs a Final Rule LGIP and Final Rule LGIA. The Commission believes that these documents will provide just and reasonable terms and conditions of transmission service while ensuring that reliability is protected and that they will provide a reasonable balance between the competing goals of uniformity and flexibility.

1. Need for Standard Generator Interconnection Procedures and Agreement

8. In April 1996, in Order No. 888, the Commission established the foundation necessary to develop competitive bulk power markets in the United States: non-discriminatory open access transmission services by public utilities and stranded cost recovery rules to provide a fair transition to competitive markets. Order No. 888 did not directly address generator interconnection issues.

9. In Tennessee Power Company[7] (Tennessee) the Commission clarified that interconnection is a critical component of open access transmission service and thus is subject to the requirement that utilities offer comparable service under the OATT. In Tennessee the Commission encouraged, but did not require, each Transmission Provider to revise its OATT to include interconnection procedures, including a standard interconnection agreement and specific criteria, procedures, milestones, and time lines for evaluating Interconnection Requests.[8]

10. The Commission to date has addressed interconnection issues on a case-by-case basis. Although a number of Transmission Providers have filed interconnection procedures as part of their OATTs,[9] many industry participants remain dissatisfied with existing interconnection policy and procedures. With the increasing number of interconnection-related disputes, it has become apparent that the case-by-case approach is an inadequate and inefficient means to address interconnection issues.

11. Interconnection plays a crucial role in bringing much-needed generation into the market to meet the growing needs of electricity customers. Further, relatively unencumbered entry into the market is necessary for competitive markets. However, requests for interconnection frequently result in complex, time consuming technical disputes about interconnection feasibility, cost, and cost responsibility. This delay undermines the ability of generators to compete in the market and provides an unfair advantage to utilities that own both transmission and generation facilities. The Commission concludes that there is a pressing need for a single set of procedures for jurisdictional Transmission Providers and a single, uniformly applicable interconnection agreement for Large Generators.[10] A standard set of procedures as part of the OATT for all jurisdictional transmission facilities will minimize opportunities for undue discrimination and expedite the development of new generation, while protecting reliability and ensuring that rates are just and reasonable.

***3** 12. Interconnection is a critical component of open access transmission service, and standard interconnection procedures and a standard agreement applicable to Large Generators will serve several important functions: they will (1) limit opportunities for Transmission Providers to favor their own generation, (2) facilitate market entry for generation competitors by reducing interconnection costs and time, and (3) encourage needed investment in generator and transmission infrastructure. The Commission expects that the Final Rule

LGIP and Final Rule LGIA (as well as the documents that will be developed in the Small Generator Interconnection proceeding - see footnote 10, supra) will resolve most disputes, minimize opportunities for undue discrimination, foster increased development of economic generation, and protect system reliability. Therefore, the Commission adopts the Final Rule LGIP and Final Rule LGIA, which will be required as an amendment to the OATT of each public utility that owns, controls, or operates facilities for transmitting electric energy in interstate commerce. As discussed below, more flexibility is available to independent transmission entities in the procedures and agreement they must adopt as compared with the standard provisions adopted herein.

2. Interconnection ANOPR

13. The Commission issued an Advance Notice of Proposed Rulemaking (ANOPR) regarding generator interconnection on October 25, 2001.[11] As a point of departure, the ANOPR presented the Standard Generator Interconnection Procedures and Standard Generation Interconnection Agreement of the Electric Reliability Council of Texas (ERCOT).[12] The Commission supplemented and modified the ERCOT documents with various "best practices" that were identified in Attachment A to the ANOPR. These "best practices" were based, in part, on generator interconnection procedures and agreements that had been approved by the Commission in past cases. The ANOPR instructed the commenters and parties to assume that the Commission's current pricing policy, as described in ANOPR Attachment B, would remain in effect.

14. The ANOPR initiated a consensus-making process in which members of various segments of the electric power industry, government, and the public had an opportunity to provide input. This effort resulted in two documents that largely shaped the Notice of Proposed Rulemaking (Large Generator Interconnection NOPR) that followed.[13] These two documents are referred to as the Consensus LGIP and Consensus LGIA (although a consensus was not reached on all issues). The Commission received numerous comments, primarily from Transmission Providers, Transmission Owners, generators (herein called Interconnection Customers), and state regulators, on the ANOPR and the Consensus LGIP and Consensus LGIA.

3. Interconnection NOPR

a. Overview of the NOPR

15. Although the negotiators did not reach consensus on every issue, the Consensus LGIP and LGIA reflect substantial agreement among diverse interests. The Commission used these documents and the comments on them to create the proposed standard LGIP and LGIA documents (NOPR LGIP and NOPR LGIA). Generally, the NOPR used the Consensus

LGIP and LGIA provisions where there was agreement. Where the participants could not reach consensus on a particular issue and options were presented in the Consensus LGIP and LGIA, the Commission chose between those options guided by the principle of minimizing barriers to entry of new generation without increasing the risk of reliability problems. Where an issue remained unresolved and no option was presented, the Commission generally proposed the ERCOT provision.

b. Severing of Small Generator Issues from the NOPR

***4** 16. In their comments on the interconnection NOPR, supporters of Small Generators (which are defined herein as devices for the production of electricity having a capacity no more than 20 MW) requested that the Commission adopt separate rules and procedures for interconnecting Small Generators. They argued that use of a Final Rule LGIP and Final Rule LGIA designed for Large Generators would unduly hinder the development of Small Generators. They sought streamlined procedures and requirements that would allow an Interconnection Customer with a Small Generator to avoid delays caused by studying sequentially the effects of interconnecting its generator with the Transmission Provider's electric system.

17. Persuaded by this request, the Commission decided to propose separate Small Generator interconnection procedures and an agreement (SGIP and SGIA) to provide the right incentives for both Transmission Providers and Interconnection Customers with Small Generators.[14] To that end, the Commission severed the issues related to interconnecting generators no larger than 20 MW from this proceeding and initiated another rulemaking docket, RM02-12-000, for the former.[15]

B. Legal Authority

1. The Federal Power Act and Order No. 888

18. In fulfilling its responsibilities under Sections 205 and 206 of the Federal Power Act,[16] the Commission is required to address, and has the authority to remedy, undue discrimination. The Commission must ensure that the rates, contracts, and practices affecting jurisdictional transmission do not reflect an undue preference or advantage for non-independent Transmission Providers and are just and reasonable. Additionally, as discussed in Order No. 888, the Commission's regulatory authority under the Federal Power Act "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to [FPA] §§ 202 and 203, and under like directives contained in Sections 205, 206, and 207."[17]

19. The record underlying Order No. 888 showed that public utilities owning or controlling

jurisdictional transmission facilities had the incentive to engage in, and had engaged in, unduly discriminatory transmission practices.[18] The Commission in Order No. 888 also thoroughly discussed the legislative history and case law involving Sections 205 and 206, concluded that it had the authority and responsibility to remedy the undue discrimination it had found by requiring open access, and decided to do so through a rulemaking on a generic, industrywide basis.[19] The Supreme Court affirmed the Commission's decision to exercise this authority by requiring non-discriminatory (comparable) open access as a remedy for undue discrimination.[20]

***5** 20. The Commission has identified interconnection as an element of transmission service that is required to be provided under the OATT.[21] Thus, the Commission may order generic interconnection terms and procedures pursuant to its authority to remedy undue discrimination and preferences under Sections 205 and 206 of the Federal Power Act.

2. Commission Interconnection Case Law

21. Unless expressly changed in this Final Rule, the holdings in the Commission's existing interconnection precedents will remain a useful guide during the implementation of this Final Rule. The Commission's interconnection cases have drawn the distinction between Interconnection Facilities and Network Upgrades. Interconnection Facilities are found between the Interconnection Customer's Generating Facility and the Transmission Provider's Transmission System. The Commission has developed a simple test for distinguishing Interconnection Facilities from Network Upgrades: Network Upgrades include only facilities at or beyond the point where the Interconnection Customer's Generating Facility interconnects to the Transmission Provider's Transmission System.[22] The Commission has made clear that Interconnection Agreements are evaluated by the Commission according to the just and reasonable standard.[23] Most improvements to the Transmission System, including Network Upgrades, benefit all transmission customers, but the determination of who benefits from such Network Upgrades is often made by a non-independent transmission provider, who is an interested party. In such cases, the Commission has found that it is just and reasonable for the Interconnection Customer to pay for Interconnection Facilities but not for Network Upgrades. Agreements between the Parties to classify Interconnection Facilities as Network Upgrades, or to otherwise directly assign the costs of Network Upgrades to the Interconnection Customer, have not been found to be just and reasonable and have been rejected by the Commission.[24]

22. Regarding pricing for a non-independent Transmission Provider, the distinction between Interconnection Facilities and Network Upgrades is important because Interconnection Facilities will be paid for solely by the Interconnection Customer, and while Network Upgrades will be funded initially by the Interconnection Customer (unless the Transmission Provider elects to fund them), the Interconnection Customer would then be entitled to a cash

equivalent refund (i.e., credit) equal to the total amount paid for the Network Upgrades, including any tax gross-up or other tax-related payments. The refund would be paid to the Interconnection Customer on a dollar-for-dollar basis, as credits against the Interconnection Customer's payments for transmission services, with the full amount to be refunded, with interest within five years of the Commercial Operation Date. The Commission has clarified that transmission credits may be used whether or not a Generating Facility is being dispatched and that credits must be accepted for all network transmissions by the Interconnection Customer, regardless of whether the plant from which the credits originated is dispatched.[25] Credits are not tied to any particular Generating Facility.[26] The Commission has stated that peaking facilities, for instance, must be allowed to use credits even when the Generating Facility is not dispatched.[27] The Commission has also allowed Transmission Providers to require several Interconnection Customers to share the costs of Network Upgrades, under certain circumstances.[28]

***6** 23. The Commission has also clarified that an Interconnection Customer need not enter into an agreement for the delivery component of transmission service to interconnect with a Transmission Providers' Transmission System.[29] At the same time, Interconnection Service or an interconnection by itself does not confer any delivery rights from the Generating facility to any points of delivery.[30]

24. The Commission has clarified that ownership of the Interconnection Facilities does not have a direct effect on reliability of the system. Therefore, as long as the Transmission Provider operates the Interconnection Facilities, the Commission will allow an Interconnection Customer to own part, or all, of those facilities.[31]

C. Differences Between the Proposed and Final Rules

25. The Final Rule LGIP and Final Rule LGIA largely track the proposed documents. Changes made in the Final Rule tend to be specific to an individual LGIP section or LGIA article, and do not require fundamental changes to the documents. That being said, there are a few significant issues, some substantive and others organizational, that the Commission summarizes here.

26. Most importantly, we note that the Final Rule applies to independent and non-independent Transmission Providers alike, but non-independent Transmission Providers are required to adopt the Final Rule LGIP and Final Rule LGIA into their OATTs, with deviations from the Final Rule justified using either the "regional differences" or "consistent with or superior to" standard. We also allow Regional Transmission Organizations (RTOs) and ISOs more flexibility to customize an LGIP and LGIA to meet their regional needs. This applies to terms and conditions as well as pricing. While RTOs and ISOs are required to submit compliance filings, they may submit LGIP and LGIA terms and conditions that meet an

"independent entity variation" standard that is more flexible than the "consistent with or superior to" standard and the regional differences standard.

27. We are also including in the Final Rule LGIA an article addressing insurance requirements and limiting liability for consequential damages, both of which were absent from the NOPR. Provision for liquidated damages had been removed from the Final Rule LGIP but remains an option in the Final Rule LGIA. Also, in the Final Rule LGIP, when a Transmission Provider elects to study Interconnection Requests in Clusters, it would simultaneously study all Interconnections Requests received within a 180 day window, rather than a 90 day window as proposed.

28. On pricing, we clarify the approach set forth in the NOPR. We continue our current policy of requiring a Transmission Provider that is not an independent entity to provide transmission credits for the cost of Network Upgrades needed for a Generating Facility interconnection. For a Transmission Provider that is an independent entity, such as an RTO or ISO, we allow flexibility as to the specifics of the interconnection pricing policy. Also, an RTO or ISO may propose participant funding for Network Upgrades for a generator interconnection, and, for a transitional period not to exceed a year, a region may use participant funding as soon as an independent administrator has been approved by the Commission and the affected states.

***7** 29. Where the policy of transmission credits for upgrades required as a result of the interconnection applies, the Commission provides several clarifications in this Final Rule. For example, the Interconnection Customer should receive transmission credits only if its Generating Facility has achieved commercial operation. Transmission credits are to be paid to the Interconnection Customer when upgrades to an Affected System[32] are constructed and the Interconnection Customer has paid for them. Finally, the Transmission Provider may decline to award credits for only those transmission charges that are designed to recover out-of-pocket costs, such as the cost of line losses, associated with the delivery of the output of the Generating Facility.

II. DISCUSSION

30. In Part A of this discussion we address the Standard Large Generator Interconnection Procedures (Final Rule LGIP) that specify the details of the uniform process a prospective Interconnection Customer and its Transmission Provider shall use to initiate, evaluate, and implement an Interconnection Request pursuant to the Final Rule.

31. In Part B we discuss the details of the Standard Large Generator Interconnection Agreement (Final Rule LGIA) to be executed by the prospective Interconnection Customer, the Transmission Provider and, where appropriate, the Transmission Owner. This document is

incorporated as Appendix 6 to the Standard Large Generator Interconnection Procedures and covers the related rights and obligations of the Parties.[33]

32. In Part C, we discuss a number of other significant policy issues in connection with this rulemaking, including pricing policies; the required Interconnection Services; the treatment of "Distribution" level interconnections; Qualifying Facility matters; variations from the Final Rule and accommodation of regional differences; the availability of waivers for small entities; OATT reciprocity implications for interconnection requests; assorted clarifications to the NOPR's proposals; insurance and liquidated damages matters; two-versus three party interconnection agreements; and consequential damage issues.

33. In Part D, we address Compliance Issues pertaining to the requirement for a Transmission Provider to file conforming amendments to its existing OATT; the treatment to be accorded existing interconnection agreements (grandfathering); and the method a Transmission Provider is to use to file executed and unexecuted interconnection agreements in accord with this Final Rule.

A. Issues Related to the Standard Large Generator Interconnection Procedures (LGIP)

1. Overview[34]

34. The Final Rule Standard Large Generator Interconnection Procedures (LGIP) document specifies the steps that must be followed and deadlines that must be met when an Interconnection Customer requests interconnection of either a new Generating Facility or the expansion of an existing Generating Facility with the Transmission Provider's Transmission System.[35] The Commission directs each public utility to amend its OATT with a single compliance filing to incorporate the Final Rule LGIP and the Standard Large Generator Interconnection Agreement (LGIA) documents. RTOs and ISOs must also make compliance filings, but as discussed above, will have more flexibility to propose different procedures and a different agreement.

***8** 35. The Final Rule LGIP sets forth the following steps to secure an interconnection. First, the prospective Interconnection Customer will submit an Interconnection Request to the Transmission Provider along with a $10,000 deposit, preliminary site documentation, and the expected In-Service Date.[36] The Transmission Provider will acknowledge receipt of the request and promptly notify the Interconnection Customer if its request is deficient. When the Interconnection Request is complete, the Transmission Provider will place it in its interconnection queue with other pending requests. The Transmission Provider will assign a Queue Position to each completed Interconnection Request based on the date and time of its receipt.[37] Queue Position is used to determine the order of performing the various

Interconnection Studies and the assignment of cost responsibility for the construction of facilities necessary to accommodate the Interconnection Request.[38] The Transmission Provider will also maintain a list of all Interconnection Requests[39] on its OASIS.[40]

36. The Parties will then schedule a Scoping Meeting to discuss possible Points of Interconnection and exchange technical information, including data that would reasonably be expected to affect such interconnection options.[41] The Scoping Meeting is followed by a series of Interconnection Studies to be performed by, or at the direction of, the Transmission Provider to evaluate the proposed interconnection in detail, identify any Adverse System Impacts on the Transmission Provider's Transmission System or Affected Systems, and specify the facility modifications that are needed to safely and reliably complete the interconnection.[42] These studies include:
(1) Interconnection Feasibility Study to evaluate on a preliminary basis the feasibility of the proposed interconnection, using power flow and short-circuit analyses (to be completed within 45 Calendar Days from the date of signing of an Interconnection Feasibility Study Agreement) (study requires a $10,000 deposit);

(2) Interconnection System Impact Study to evaluate on a comprehensive basis the impact of the proposed interconnection on the reliability of Transmission Provider's Transmission System and Affected Systems, using a stability analysis, power flow, and short-circuit analyses (to be completed within 60 Calendar Days from the date of signing of an Interconnection System Impact Study Agreement) (study requires a $50,000 deposit);[43]

(3) Interconnection Facilities Study to determine a list of facilities (including Transmission Provider's Interconnection Facilities and Network Upgrades as identified in the Interconnection System Impact Study), the cost of those facilities, and the time required to interconnect the Generating Facility with the Transmission Provider's Transmission System (to be completed within 90-180 Calendar Days from the date of signing of an Interconnection Facilities Study Agreement) (study requires a $100,000 deposit or an estimated monthly cost developed by the Transmission Provider for conducting the Interconnection Facilities Study); and

***9** (4) Optional Interconnection Study or sensitivity analysis of various assumptions specified by the Interconnection Customer to identify any Network Upgrades that may be required to provide transmission delivery service over alternative transmission paths for the electricity produced by the Generating Facility and (study requires a $10,000 deposit).

37. The Interconnection Feasibility Study, the Interconnection System Impact Study, and the Interconnection Facilities Study must be performed in the above order, with completion of each study before the next begins.[44] An Interconnection Customer may also request a

restudy of any of the above if a higher-queued project either drops out of the queue, is subjected to Material Modifications, or changes its Point of Interconnection.[45] The Interconnection Customer will pay the actual costs for performing each of the Interconnection Studies and restudies.

38. The Transmission Provider's Interconnection Facilities Study report[46] will include a best estimate of the costs to effect the requested interconnection which are to be funded up-front by the Interconnection Customer. At the same time as the report is issued, the Transmission Provider shall also give the Interconnection Customer a draft interconnection agreement completed to the extent practicable.[47] The Transmission Provider and the Interconnection Customer will then negotiate the schedule for constructing and completing any necessary Transmission Provider Interconnection Facilities and Network Upgrades, and incorporate this schedule into the interconnection agreement that is signed by the Parties.[48]

2. Section-by-Section Discussion of the Proposed LGIP

39. What follows is a discussion of the standard interconnection procedures the Commission proposed, the comments received, and the Commission's conclusion. The order of discussion follows the organization of the proposed LGIP, covering Sections 1-13. Only subsections for which issues are raised are presented. For example, we discuss Section 2.3, but not Sections 2.1 or 2.2 because no significant issues were raised regarding Sections 2.1 or 2.2. Readers should note that section numbers referred to in the following discussion are the numbers contained in the proposed LGIP. Some proposed sections are renumbered in the Final Rule; mention of that fact will be made in the Commission Conclusions discussion, where appropriate. Also, note that Proposed LGIP Section 14 is eliminated from the Final Rule in its entirety because provisions for interconnection procedures and an interconnection agreement for Small Generators have been severed from this proceeding, as discussed, supra.

40. **Section 1 - Definitions** - Section 1 of the NOPR LGIP and Article 1 of the NOPR LGIA contained defined terms that appeared in the respective documents. For the sake of consistency, the Final Rule LGIP and Final Rule LGIA contain one common set of terms. Included in the list of defined terms are a number of new terms which were not included in the NOPR LGIP and NOPR LGIA. Comments relating to the definition of terms in both documents are discussed below.

***10** 41. **Ancillary Services** (In the NOPR: Ancillary and Other Services) - The NOPR proposed that Ancillary and Other Services would have the same meaning as defined in the Transmission Provider's OATT and include some other services such as generator balancing, black start, and automatic generation control.

Comments

Commission allow a Transmission Provider greater flexibility to make changes using a regional differences rationale. Monongahela Power argues that regional differences should be accommodated, but only on a case-by-case basis through application for exemption rather than through changes to the Final Rule. In this way, the Final Rule serves as a baseline national standard. In contrast, Mirant requests that the Commission restrict the availability of variations based on regional differences to large, established ISOs that can show that the variations are consistent with or superior to what appears in the Final Rule.

821. NYISO recommends that the Commission revise the definition of Good Utility Practice, which was proposed to include "practices, methods or acts generally accepted in a region," and which is used repeatedly in the NOPR LGIP and NOPR LGIA to describe the standards that will be applied to certain obligations. It urges that the definition should include among eligible regions those administered by an RTO or ISO.

Commission Conclusion

822. We will apply a regional differences rationale to accommodate variations from the Final Rule during compliance, but with certain restrictions. We conclude that a non-independent transmission provider (such as a Transmission Provider that owns generators or has Affiliates that own generators) and an RTO or ISO should be treated differently because an independent RTO or ISO does not raise the same level of concern regarding undue discrimination. Accordingly, we will allow an RTO or ISO greater flexibility than that allowed under the regional differences rationale to propose variations from the Final Rule provisions, as further discussed below.

***149** 823. Although commenters generally did not identify provisions in the NOPR LGIP or NOPR LGIA that should be subject to variations based on "regional differences," when a commenter did provide specific provisions, the revisions were based on the reliability requirements of a given region. Because we intend to supplement rather than supplant the work that regional reliability groups already have undertaken regarding interconnection, we are permitting a Transmission Provider, on compliance, to offer variations based on existing regional reliability requirements. Accordingly, regional flexibility is included in the Final Rule definition of Good Utility Practice, which includes practices established by relevant reliability councils and local laws and regulations. We accommodate NYISO's proposal that the definition of Good Utility Practice be revised as requested by instead defining it to include "acceptable practices, methods, or acts generally accepted in the region." Thus, this definition includes by implication the Commission-approved practices of those regions administered by an RTO or ISO.

824. Nevertheless, there may be Final Rule provisions that do not include reference to Good Utility Practice that may be subject to or affected by regional reliability restrictions. Rather

than identify all such provisions in the Final Rule, as the Florida RCC proposes, we leave it to the Transmission Provider to justify variations based on regional requirements. With this approach, we are permitting public utilities the flexibility necessary to ensure that reliability needs are met. Because we seek greater standardization of interconnection terms and conditions, we are not permitting a non-independent Transmission Provider to use the regional differences justification in the absence of established regional reliability standards.

825. For other proposed deviations from the Final Rule LGIP and Final Rule LGIA not made in response to established regional reliability requirements, we are requiring non-independent transmission providers to justify variations in non-price terms and conditions of the Final Rule LGIP and Final Rule LGIA using the approach taken in Order No. 888, which allows them to propose variations on compliance that are "consistent with or superior to" the OATT.

826. To clarify, if on compliance a non-RTO or ISO Transmission Provider offers a variation from the Final Rule LGIP and Final Rule LGIA and the variation is in response to established (i.e., approved by the Applicable Reliability Council) reliability requirements, then it may seek to justify its variation using the regional difference rationale. If the variation is for any other reason, the non-RTO or ISO Transmission Provider must present its justification for the variation using the "consistent with or superior to" rationale that the Commission applies to variations from the OATT in Order No. 888.

***150** 827. With respect to an RTO or ISO, at the time its compliance filing is made, as discussed above, we will allow it to seek "independent entity variations" from the Final Rule pricing and non-pricing provisions. This is a balanced approach that recognizes that an RTO or ISO has different operating characteristics depending on its size and location and is less likely to act in an unduly discriminatory manner than a Transmission Provider that is a market participant. The RTO or ISO shall therefore have greater flexibility to customize its interconnection procedures and agreements to fit regional needs.

6. Waiver Availability for Small Entities

828. In the NOPR, we did not address whether special provisions are needed for small Transmission Providers for whom providing Interconnection Services might be overly burdensome.

Comments

829. Maine PSC asks the Commission to provide flexibility and waiver of the full requirements of the Final Rule LGIP and Final Rule LGIA for small transmission owners. Southwest Transmission requests that the current "small utility" exception for Order Nos. 888

System.

Appendix 5

Transmission Provider's Description of Transmission System Upgrades and Best Estimate of Upgrade Costs

Transmission Provider shall describe Upgrades and provide an itemized best estimate of the cost, including overheads, of the Upgrades and annual operation and maintenance expenses associated with such Upgrades. Transmission Provider shall functionalize Upgrade costs and annual expenses as either transmission or distribution related.

Footnotes

[1] Readers may note that provisions of the Final Rule LGIP are referred to as "Sections" whereas provisions of the Final Rule LGIA are referred to as "Articles."

[2] Such filings must be made within 60 days of publication of this Final Rule in the Federal Register.

[3] Unless otherwise defined in this Preamble, capitalized terms used in this Final Rule have the meanings specified in Section 1 of the Final Rule LGIP and Article 1 of the Final Rule LGIA. The term Generating Facility means the specific device for which the Interconnection Customer has requested interconnection. The owner of the Generating Facility is referred to as the Interconnection Customer. The entity (or entities) with which the Generating Facility is interconnecting is referred to as the Transmission Provider. The term Large Generator is intended to refer to any energy resource having a capacity of more than 20 megawatts, or the owner of such a resource.

[4] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

[5] New Interconnection Requests include those submitted after the effective date of this Final Rule and include requests to increase the capacity of, or modify the operating characteristics of, an existing Generating Facility that is interconnected with the Transmission Provider's Transmission System.

6 Regional Transmission Organizations, Order No. 2000, 65 FR810 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, 65 FR 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), aff'd sub nom. Public Util. Dist. No. 1 v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

7 Tennessee Power Company, 90 FERC ¶ 61,238 (2002).

8 See e.g., Commonwealth Edison Co., 91 FERC ¶ 61,083 (2000).

9 See e.g., American Electric Power Service Corp., 91 FERC ¶ 61,308 (2000), order denying reh'g and granting clarification, 94 FERC ¶ 61,166, order dismissing request for clarification, 95 FERC ¶ 61,130 (2001), appeal docketed sub nom. Tenaska, Inc. v. FERC, No. 01-1194 (D.C. Cir. Apr. 23, 2001); Southwest Power Pool, Inc., 92 FERC ¶ 61,109 (2000); Carolina Power & Light Co., 93 FERC ¶ 61,032 (2000), reh'g denied, 94 FERC ¶ 61,165 (2001), appeal docketed sub nom. Tenaska, Inc. v. FERC, No. 01-1195 (D.C. Cir. Apr. 23, 2001); Virginia Electric & Power Co., 93 FERC ¶ 61,307 (2000), order on clarification, 94 FERC ¶ 61,045, reh'g denied, 94 FERC ¶ 61,164 (2001), appeal docketed sub nom. Tenaska, Inc. v. FERC, No. 01-1196 (D.C. Cir. Apr. 23, 2001); Consumers Energy Co., 93 FERC ¶ 61,339 (2000), order on reh'g and clarification, 94 FERC ¶ 61,230, order on clarification and denying reh'g, 95 FERC ¶ 61,131 (2001).

10 In another rulemaking, the Commission proposes a separate set of procedures and an agreement applicable to Small Generators (any energy resource having a capacity of no larger than 20 MW, or the owner of such a resource) that seek to interconnect to jurisdictional Transmission Providers. See Standardization of Small Generator Interconnection Agreements and Procedures, Notice of Proposed Rulemaking, Docket No. RM02-12-000 (issued concurrently with this Final Rule) 104 FERC ¶ 61,104.

11 Standardizing Generator Interconnection Agreements and Procedures, Advance Notice of Proposed Rulemaking, 66 FR 55140 (Nov. 1, 2001), FERC Stats. & Regs. ¶ 35,540 (2001).

12 The ERCOT agreement and procedure were appended to the ANOPR as Appendix A.

13 Standardization of Generator Interconnection Agreements and Procedures, Notice of Proposed Rulemaking, 67 FR 22250 (May 2, 2002), FERC Stats. & Regs. ¶ 32,560 (2002).

14 The Small Generator Interconnection ANOPR proposed adopting two Small Generator Interconnection Procedures documents and two Small Generator Interconnection Agreements, with the distinction between the two sets of documents being the size of the Small Generator.

15 See Standardization of Small Generator Interconnection Agreements and Procedures, Advance Notice of Proposed Rulemaking, 67 FR 54749 (Aug. 26, 2002), FERC Stats. & Regs. ¶ 35,544 (2002).

16 16 U.S.C. 824d, 824e (2000).

17 Gulf States Utils. Co. v. FPC, 411 U.S. 747, 758-59 (1973); see City of Huntingburg v. FPC, 498 F.2d 778, 783-84 (D.C. Cir. 1974) (noting the Commission's duty to consider the potential anti-competitive effects of a proposed interconnection agreement).

18 Order No. 888, FERC Stats. & Regs ¶ 31,036 at 31,679-84; Order No. 888-A, FERC Stats. & Regs ¶ 31,048 at 30,209-10.

19 Order No. 888, FERC Stats. & Regs ¶ 31,036 at 31,668-73, 31,676-79; Order No. 888-A, FERC Stats. & Regs ¶ 31,048 at 30,201-12; TAPS v. FERC, 225 F.3d 667, 687-88 (D.C. Cir. 2000).

20 New York v. FERC, 535 U.S. 1 (2002).

21 See Tennessee Power Co., 90 FERC ¶ 61,238 at 61,761, reh'g dismissed, 91 FERC ¶ 61,271 (2000).

22 Entergy Gulf States, Inc., 98 FERC ¶ 61,014 at 61,023, reh'g denied, 99 FERC ¶ 61,095 (2002); see Public Service Co. of Colorado, 59 FERC ¶ 61,311 (1992), reh'g denied, 62 FERC ¶ 61,013 at 61,061 (1993).

23 Pacific Gas & Electric Company, et al., 102 FERC ¶ 61,070 (2003).

24 See e.g. Illinois Power Co., 103 FERC ¶ 61,032 (2003); American Electric Power Service Corp., 101 FERC ¶ 61,194 (2002).

25 Entergy Services, Inc., 101 FERC ¶ 61,289 (2002).

26 Id.

27 Colton Power, LP, 101 FERC ¶ 61,150 (2002).

28 Id.

29 Entergy Services, Inc., 101 FERC ¶ 61,016 (2002); Southern Company Services, Inc., 95 FERC ¶ 61,307 at 62,049, order dismissing reh'g, 96 FERC ¶ 61,168 (2001); Tennessee Power Co., 90 FERC ¶ 61,238 at 61,761 (2000).

30 See Arizona Public Service Co., 94 FERC ¶ 61,027 at 61,076, order on reh'g, 94 FERC ¶ 61,267 (2001).

31 Arizona Public Service Company, 102 FERC ¶ 61,303 (2003).

32 An Affected System is an electric system other than the Transmission Provider's Transmission System that may be affected by the proposed interconnection.

33 The Final Rule LGIP and Final Rule LGIA define Party or Parties as "Transmission Provider, Transmission Owner, Interconnection Customer, or any combination of the above."

34 For the convenience of the reader, a flow chart depicting the interconnection process is appended to this preamble as Appendix A.

35 Any Transmission Provider with an Interconnection Request outstanding at the time this Final Rule becomes effective shall transition to the Final Rule LGIP within a reasonable period of time. This is further described in Final Rule LGIP Section 5.1.

36 The standard form of Interconnection Request is Appendix 1 of the LGIP document.

37 For example, the first complete Interconnection Request, assigned an earlier Queue Position, is "higher-queued" relative to the second complete Interconnection Request that is assigned a later Queue Position and is "lower queued." The withdrawal of a complete Interconnection Request causes it to lose its Queue Position and all succeeding complete Interconnection Requests to advance, accordingly.

38 Any Interconnection Customer assigned a Queue Position before the effective date of this Final Rule would retain that Queue Position.

39 We emphasize that the Final Rule LGIP requires the Transmission Provider, the Transmission Owner, and such entities' officers, employees, and contractors to maintain proper procedures for Confidential Information provided by an Interconnection Customer related to the Interconnection Request, the disclosure of which could harm or prejudice the Interconnection Customer or its business.

40 Open Access Same-Time Information System and Standards of Conduct, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 at 31,590 (1996), order on reh'g, Order No. 889-A, 62 FR 12484 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,049 (1997), reh'g denied, Order No. 889-B , 81 FERC ¶ 61,253 (1997), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

41 The Scoping Meeting will address technical matters such as facility loadings, general instability issues, general short-circuit issues, general voltage issues, and general reliability issues that would affect the Interconnection Customer's designation of its Point of Interconnection.

42 The standard forms of agreement for the Interconnection Feasibility Study, the Interconnection System Impact Study, the Interconnection Facilities Study, and the Optional Interconnection Study, are included at Appendices 2-4 to the Final Rule LGIP, respectively.

43 At the Transmission Provider's option, Interconnection System Impact Studies for multiple Generating Facilities may be conducted serially or in clusters.

44 These Interconnection Studies are typical of the kinds of studies undertaken by Transmission Providers to evaluate Interconnection Requests. The Interconnection Facilities Studies and Interconnection System Impact Studies also correspond to transmission service studies described in the pro forma open access tariff. See Order No. 888-A (Tariff Part II, 19 Additional Study Procedures For Firm Point-To-Point Transmission Service Requests; and Tariff Part III, 32 Additional Study Procedures For Network Integration Transmission Service Requests), FERC Stats. & Regs., Regulations Preambles (July 1996-December 2000), ¶ 31,048 at 30,524-26 and 30,535-36.

45 An Interconnection Feasibility Restudy must be completed within 45 Calendar Days of such request. Similarly, the Transmission Provider has 60 Calendar Days to complete either an Interconnection System Impact Restudy or an Interconnection Facilities Restudy.

46 Upon the completion of each of the Interconnection Studies, a report is prepared which presents the results of the analyses.

47 The draft interconnection agreement shall include: Appendix A, Interconnection Facilities, Network Upgrades and Distribution Upgrades; Appendix B, Milestones; Appendix C, Interconnection Details; Appendix D, Security Arrangements Details; Appendix E, Commercial Operation Date; and Appendix F, Addresses for Delivery of Notices and Billings.

48 In general, the In-Service Date of an Interconnection Customer's Generating Facility or Generating Facility expansion will determine the sequence of construction of Network Upgrades. An Interconnection Customer, in order to achieve its expected In-Service Date, may request that the Transmission Provider advance the completion of Network Upgrades necessary to support such In-Service Date that would otherwise not be completed pursuant to a contractual obligation of an entity other than the Interconnection Customer. The Transmission Provider will use Reasonable Efforts to advance the construction if the Interconnection Customer reimburses it for any associated expediting costs and the cost of such Network Upgrades. The Interconnection Customer is entitled to transmission credits for the expediting costs that it pays.

49 See e.g., Article 7 (Metering), Article 8 (Communications) and Article 9 (Operations).

50 E.g., Edison Mission, Georgia Transmission, MidAmerican, and SoCal Water District.

51 See Entergy Gulf States, Inc., 99 FERC ¶ 61,095 (2002).

52 E.g., Entergy Services, Inc. v. FERC, 319 F.3d 536 (D.C. Cir. 2003); Southern Company Services, Inc., 101 FERC ¶ 61,309 (2002); American Electric Power Service Corp., 101 FERC ¶ 61,194 (2002); Tampa Electric Company, 99 FERC ¶ 61,192 (2002).

53 Mirant states that the following language was left out of Section 2.3 of the NOPR LGIP: "and contingency lists upon request subject to confidentiality provisions. Such databases and lists, herein referred to as Base Cases, shall include all (I) generation projects and (ii) transmission

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on April 5, 2021. Participants in the case will be served by the appellate CM/ECF system.

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